(2)

No. 91-1418

Supreme Court, U.S.
FILED
JUN 3 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM M. ABROMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
KATHLEEN A. FELTON
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court correctly determined that the issue of materiality under 18 U.S.C. 1623 is a question of law for the court and not subject to proof beyond a reasonable doubt.

2. Whether the evidence at trial was sufficient to support petitioner's conviction.

3. Whether evidence of conversations in which petitioner did not take part was properly admitted.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Commonwealth v. *McDuffee*, 398 N.E.2d 463 (Mass. 1979)	11
Kungys v. *United States*, 485 U.S. 759 (1988)	9, 10
People v. *Figueroa*, 715 P.2d 680 (Cal. 1986)	10, 11
Russell v. *United States*, 369 U.S. 749 (1962)	7
Sinclair v. *United States*, 279 U.S. 263 (1929)	7
United States v. *Adler*, 623 F.2d 1287 (8th Cir. 1980)	8
United States v. *Armilio*, 705 F.2d 939 (8th Cir.), cert. denied, 464 U.S. 891 (1983)	8
United States v. *Berardi*, 629 F.2d 723 (2d Cir.), cert. denied, 449 U.S. 995 (1980)	8
United States v. *Daily*, 921 F.2d 994 (10th Cir. 1990), cert. denied, 112 S. Ct. 405 (1991)	9, 10
United States v. *Doherty*, 906 F.2d 41 (1st Cir. 1990)	8
United States v. *Farnham*, 791 F.2d 331 (4th Cir. 1986)	8
United States v. *Giacalone*, 587 F.2d 5 (6th Cir. 1978), cert. denied, 442 U.S. 940 (1979)	8
United States v. *Irwin*, 654 F.2d 671 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982)	9
United States v. *Larranaga*, 787 F.2d 489 (10th Cir. 1986)	8, 9
United States v. *Martinez*, 855 F.2d 621 (9th Cir. 1988)	8, 9
United States v. *Valdez*, 594 F.2d 725 (9th Cir. 1979)	8-9

Cases—Continued: Page

United States v. *Watson*, 623 F.2d 1198 (7th Cir. 1980) 8
Winship, In re, 397 U.S. 358 (1970) 9, 10
Wisniewski v. *United States*, 353 U.S. 901 (1957) .. 9

Statutes and rules:

2 U.S.C. 102 7
8 U.S.C. 1451(a) 9, 10
18 U.S.C. 1001 ..... 9, 10
18 U.S.C. 1623 ..... 2, 6, 7, 8, 9
18 U.S.C. 1623(a) 6
Fed. R. Evid.:
Rule 401 13
Rule 801(c) 13

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1418

WILLIAM M. ABROMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, as amended, Pet. App. 1a-21a, is reported at 947 F.2d 1241.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1991. A petition for rehearing was denied on December 18, 1991. The petition for a writ of certiorari was filed on February 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on one count of making false statements to a grand jury, in violation of 18 U.S.C. 1623.[1] He was sentenced to 12 months in prison, to be followed by three years of supervised release, and he was fined $5,000. The court of appeals affirmed. Pet. App. 1a-20a.

1. In 1988, Danny Gonzalez and Leo Ladouceur purchased a large amount of stock in Suburban Savings Association, which is located in San Antonio, Texas. Because that purchase gave them a controlling interest in the bank, it required approval from the Federal Home Loan Bank Board (FHLBB). Gonzalez and Darrell Tomblin, a Florida businessman, discussed the possibility of using Tomblin's influence with Senator Hecht of Nevada to expedite approval. Tomblin told Gonzalez that he would have to make a $70,000 contribution to Senator Hecht's reelection campaign. Tomblin also told Gonzalez that Senator Hecht's administrative assistant, Glen Mauldin, was to receive a ten-percent share in the group's business ventures. Pet. App. 2a.

During this time, the FBI was investigating the activities of Tomblin and Mauldin. Ladouceur cooperated with the investigation and tape recorded a number of meetings. The government recorded telephone conversations of Tomblin and one of his associates. Pet. App. 2a.

---

[1] Petitioner was acquitted on another count of making false statements to the grand jury; three other counts were dismissed after the jury failed to reach a verdict.

Petitioner, a businessman from New Orleans, Louisiana, was an associate of Tomblin. On June 2, 1988, petitioner attended a meeting with Mauldin, Ladouceur, Gonzalez, Tomblin, and Tomblin's partner Robert DeJonge. The meeting was surreptitiously recorded by Ladouceur. The group discussed using Senator Hecht's office to obtain expedited approval from the FHLBB, a scheduled meeting between Gonzalez and then-FHLBB Chairman Danny Wall, and plans to acquire ten other savings and loan associations, with petitioner as a joint owner. Pet. App. 2a-3a.

On June 8, 1988, the group met with lobbyist Vince Lachelli and discussed using Senator Hecht to pressure the FHLBB. The next day, the group met with Senator Hecht, then with Chairman Wall, and again with Senator Hecht. After that meeting, petitioner remained in contact with Gonzalez concerning the acquisition of the other savings and loans. In July 1988, Gonzalez, Tomblin, Lachelli, and Ladouceur telephoned petitioner from Sarasota, Florida, to discuss having Senator Hecht send a letter to Chairman Wall concerning some of their business ventures. Pet. App. 3a.

The group also developed plans for other ventures. For example, they planned to import products from Grenada and acquire an oil refinery there, using the assistance of Senator Hecht's office. In a conversation recorded in July 1988, Tomblin told petitioner that he was planning to convert approximately 30 billion Mexican pesos into United States currency to help purchase savings and loans. Tomblin told petitioner that Senator Hecht's office was assisting in that effort. In August 1988, Tomblin told petitioner that Ladouceur had been arrested. Pet. App. 3a-4a.

On September 6, 1988, petitioner and Tomblin met at Louisiana State University (LSU) in Baton Rouge, Louisiana, to seek the assistance of faculty members in pursuing the Grenada venture. Citing Senator Hecht's and Mauldin's interest in the venture, Tomblin mentioned possible federal funding. Pet. App. 4a.

In three recorded telephone calls on September 6, Tomblin and petitioner discussed the LSU meeting and an upcoming meeting with the Prime Minister of Grenada. They discussed how responsibility was to be divided with respect to the Grenada venture, and Tomblin told petitioner that he would be responsible for handling taxes and the incorporation of the business. With regard to Mauldin, petitioner said, "I'm gonna tell Glen again, . . . for that ten percent, we wanta see performance. I wanta see the approval of the grants for the university." Pet. App. 4a-5a.

On September 9, Gonzalez, Tomblin, Lachelli, Mauldin, and an oil refinery expert, Ray Stancil, met with the Prime Minister of Grenada to discuss the refinery project. In a recorded telephone conversation with petitioner on September 12, Tomblin described the September 9 meeting as "great." He told petitioner that a trip to Grenada was planned. Tomblin also stated that "Glen" (*i.e.*, Mauldin) and Stancil had been at the meeting. Tomblin and petitioner discussed getting crude oil from Mexico. Later that day, petitioner and Tomblin talked about using Senator Hecht to obtain debt forgiveness for Mexico in exchange for oil. Pet. App. 5a.

2. On September 15, 20, and 21, 1988, the FBI interviewed Mauldin, Lachelli, and Tomblin. The FBI recorded a telephone conversation in which petitioner and Tomblin discussed those interviews and Ladouceur's arrest. Pet. App. 5a.

On April 5, 1989, petitioner appeared before a federal grand jury. He denied any knowledge of an offer of a ten percent interest to Mauldin. Petitioner said that he did not recall any mention of Senator Hecht's or Mauldin's names at the LSU meeting. He also denied knowing who attended the meeting with the Prime Minister of Grenada. When asked whether Tomblin had discussed the meeting with him, petitioner responded, "He may have mentioned it. It just wasn't germane as to what I was doing." Pet. App. 5a.

On April 6, 1989, petitioner appeared again. He denied any knowledge of a July 1988 letter from Senator Hecht to the FHLBB. He claimed that he was unaware of any use of political influence to help gain control of Suburban. He also claimed that he had only recently learned of the arrest and indictment of Ladouceur. Pet. App. 5a-6a.

3. Petitioner was convicted on one count of making false statements to the grand jury concerning his knowledge of Mauldin's presence at the September 9 meeting with the Prime Minister of Grenada and his discussion with Tomblin about that meeting.[2] On

---

[2] The conviction was based on the following exchange in reference to the September 9, 1988, meeting at the Grenadian Embassy:

> Q: Do you know who else might have attended that meeting?
>
> A: No, Sir.
>
> Q: Did you ever have occasion to discuss it with your other partners, with Mr. Tomblin or Mr. Lachelli as to whether or not there was such a meeting and who was there?
>
> A: He may have mentioned it. It just wasn't germane as to what I was doing.

Pet. App. 8a.

appeal, petitioner disputed the sufficiency of the evidence supporting his conviction. In addition, although he acknowledged that materiality was a question of law under 18 U.S.C. 1623,[3] petitioner argued that the government was required to prove materiality beyond a reasonable doubt. The court of appeals rejected that contention. The court explained that, as a question of law, materiality is not subject to any burden of proof; rather, it is a question for the district court to answer "yes" or "no." Pet. App. 10a-12a.[4]

The court of appeals reviewed the trial court's materiality determination de novo and held that petitioner's false statements were material to the grand jury's investigation of whether Tomblin, Mauldin, and Lachelli conspired to defraud the United States. The court noted that the indictment against those three charged that Mauldin attended a meeting with the Prime Minister of Grenada and that Mauldin unlawfully sought a ten percent interest in business ventures involving Grenada. If petitioner had truthfully answered the questions relating to the September 9, 1988, business meeting at the Grenadian Embassy, the court reasoned, the grand jury could have learned valuable information about Mauldin's involvement in the Grenada refinery project. Pet. App. 12a-15a.

---

[3] Section 1623(a) provides in relevant part: "Whoever under oath * * * in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration * * * shall be fined not more than $10,000 or imprisoned not more than five years, or both."

[4] The court of appeals noted that seven other circuits have also held that materiality is a legal question that is not subject to proof beyond a reasonable doubt. Pet. App. 11a-12a & n.5.

The court of appeals rejected petitioner's claim that the district court had erroneously admitted hearsay or irrelevant evidence. Pet. App. 15a-18a. The court of appeals concluded that the evidence in question was not hearsay and that it was relevant to petitioner's state of mind. *Id.* at 18a.[5]

ARGUMENT

1. Petitioner contends that in a prosecution under 18 U.S.C. 1623, the issue of materiality is for the jury, and the government is required to prove materiality beyond a reasonable doubt. Pet. 7-22. Consistent with the decisions of this Court and other courts of appeals, however, the court below correctly determined that materiality is a question of law for the court and, as such, is not subject to proof beyond a reasonable doubt.

The well-settled rule that materiality is for the court to determine originated in *Sinclair* v. *United States*, 279 U.S. 263 (1929). There, the defendant testified before a Senate committee and was charged with "refus[ing] to answer [a] question of pertinence to the question under inquiry," in violation of 2 U.S.C. 102. The Court held that "[t]he question of pertinency under § 102 was rightly decided by the court as one of law." 279 U.S. at 298; accord *Russell* v. *United States*, 369 U.S. 749, 755-756 (1962). Explaining that pertinency "did not depend upon the probative value of evidence," the Court noted that it "may be likened to [questions] concerning relevancy" and that

[5] The court of appeals also rejected petitioner's claims that the district court erred in (1) playing portions of tape recorded conversations, rather than complete conversations; (2) denying his motion to reconsolidate and continue the suppression hearings; and (3) denying his motion to suppress the recordings. Pet. App. 18a-20a. Petitioner does not renew those contentions in this Court.

it "is not essentially different from the question as to materiality of false testimony charged as perjury." 279 U.S. at 298. The Court explained that relevancy and materiality of false testimony are questions of law, *id.* at 298-299, and concluded that it "would be incongruous and contrary to well-established principles to leave the determination of * * * [pertinency] to a jury." *Id.* at 299. Thus, under *Sinclair*, the issue of materiality, like pertinency, should be treated as a question of law for the court, and not a fact question for the jury.

Consistent with *Sinclair*, the courts of appeals have routinely treated materiality under 18 U.S.C. 1623 as a question of law that does not have to be proved beyond a reasonable doubt. See *United States* v. *Martinez*, 855 F.2d 621, 623-624 (9th Cir. 1988); *United States* v. *Farnham*, 791 F.2d 331, 333-334 (4th Cir. 1986); *United States* v. *Larranaga*, 787 F.2d 498, 494, 496 (10th Cir. 1986); *United States* v. *Armilio*, 705 F.2d 939, 941 (8th Cir.), cert. denied, 464 U.S. 891 (1983); *United States* v. *Berardi*, 629 F.2d 723, 727-728 (2d Cir.), cert. denied, 449 U.S. 995 (1980); *United States* v. *Watson*, 623 F.2d 1198, 1201-1202 (7th Cir. 1980); *United States* v. *Giacalone*, 587 F.2d 5, 6-7 (6th Cir. 1978), cert. denied, 442 U.S. 940 (1979); see also *United States* v. *Doherty*, 906 F.2d 41, 43 (1st Cir. 1990). The ruling of the court of appeals in this case is consistent with the uniform position of the circuits.[6]

---

[6] Petitioner relies on three court of appeals decisions that he asserts conflict with the decision here. Pet. 20. His reliance on those decisions, however, is misplaced. In *United States* v. *Adler*, 623 F.2d 1287, 1292 & n.8 (8th Cir. 1980), only one judge endorsed the view that materiality should be submitted to the jury; the other two panel members did not join that discussion. And while *United States* v. *Valdez*, 594

Petitioner argues that the reasoning of *Sinclair* has been undercut by this Court's decision in *In re Winship*, 397 U.S. 358 (1970), which held that the Due Process Clause incorporates the reasonable doubt standard. Pet. 13-17. Subsequent to *Winship*, however, this Court in *Kungys* v. *United States*, 485 U.S. 759, 772 (1988), expressly reaffirmed the principle of *Sinclair*. At issue in *Kungys* was a statute, 8 U.S.C. 1451(a), that required the denaturalization of persons who concealed "material facts" from the government in the processing of an application for citizenship. In defining materiality under Section 1451(a), the Court relied on the definition that courts have applied under federal criminal false statement statutes. The Court explained that "neither the evident objective sought to be achieved [by requiring materiality under Section

---

F.2d 725, 729 (9th Cir. 1979), held that materiality under 18 U.S.C. 1001 is a question for the jury, the Ninth Circuit later held, in *United States* v. *Martinez*, *supra*, that materiality under Section 1623 is a legal question for the court that is not subject to proof beyond a reasonable doubt. To the extent that *Valdez* and *Martinez* are in tension, that is a matter for the Ninth Circuit, and not this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957). Finally, the court in *United States* v. *Irwin*, 654 F.2d 671, 676-677 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982), held that the defendant could not assert error from the submission of the issue of materiality to the jury in a case under 18 U.S.C. 1001, because he had invited the error by submitting a jury instruction. Although the court noted that it had treated materiality as a jury question in the past, *Irwin* preceded the Tenth Circuit's decision in *United States* v. *Larranaga*, 787 F.2d at 494 & n.1, which held that materiality under Section 1623 is a legal question. And in *United States* v. *Daily*, 921 F.2d 994, 1004-1005 (1990), cert. denied, 112 S. Ct. 405 (1991), the Tenth Circuit held that materiality is to be treated as a question of law under Section 1001 as well.

1451(a)], nor the gravity of the consequences that follow from its being met, is so different as to justify adoption of a different standard." 485 U.S. at 770. Of direct relevance here, the Court also concluded that materiality is a question of law; "see[ing] no reason not to follow what has been done with the materiality requirement under other statutes dealing with misrepresentations to public officers," the Court expressly reaffirmed and followed *Sinclair*. *Id.* at 772. Thus, *Kungys* makes clear that, in the context of false statement statutes, materiality is a question of law for the court. See *United States* v. *Daily*, 921 F.2d 994, 1004-1005 (10th Cir. 1990) (recognizing that *Kungys* requires materiality to be treated as a question for the court, notwithstanding prior circuit precedent treating it as a jury question in cases arising under 18 U.S.C. 1001), cert. denied, 112 S. Ct. 405 (1991).

Contrary to petitioner's contention, *Winship* is not inconsistent with *Sinclair*. *Winship* simply held that an accused may not be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 363-364. To say that *Winship* impliedly overrules *Sinclair* is to beg the question whether materiality is a question of fact or of law. *Sinclair*, as reaffirmed by *Kungys*, makes clear that materiality is a legal issue, and thus need not be submitted to the jury or proved beyond a reasonable doubt.[7]

---

[7] Petitioner alleges a conflict between this case and the decisions of two state supreme courts. Pet. 21-22. The first case, *People* v. *Figueroa*, 715 P.2d 680 (Cal. 1986), did not concern materiality, but involved the question whether a particular document constituted a "security" within the meaning of a state statute. The court held that the definition of "security" was a legal matter, but the question whether a

2. Petitioner contends that the evidence was insufficient to support his conviction, because the record does not show that he knowingly made false statements. Pet. 22-24. The jury, however, heard tape-recorded evidence indicating that just prior to the September 9, 1988, meeting with the Prime Minister of Grenada, Tomblin and petitioner discussed what Mauldin, Senator Hecht's administrative assistant, could do to earn his ten percent share of the business venture. The evidence further showed that several days after the September 9 meeting, Tomblin told petitioner that Mauldin and Stancil, a refinery expert, had attended the meeting at the Grenadian Embassy. See Pet. App. 5a. The jury could thus reasonably conclude that petitioner gave a knowingly false answer when he told the grand jury he did not know who else attended the September 9 meeting, and that he was testifying falsely when he said that Tomblin "may have mentioned" the meeting but that it was not "germane" to what petitioner was doing.[8]

---

particular document satisfied the definition was a factual question for the jury. *Id.* at 693. In distinguishing *Sinclair*, the court questioned that decision's continuing vitality in light of *Winship*. *Id.* at 693 n.22. In *Commonwealth* v. *McDuffee*, 398 N.E.2d 463 (Mass. 1979), the court also concluded that *Sinclair*'s authority had been eroded, and held that materiality in a state perjury case was a question for the jury. *Id.* at 468-470. Both *Figueroa* and *McDuffee*, however, were decided before this Court in *Kungys* reaffirmed the principle that *Sinclair* established.

[8] Petitioner argues that nothing in the record establishes that he remembered what Tomblin told him about the September 9 meeting, which petitioner did not attend and which took place several months before petitioner's grand jury appearance. Pet. 23-24. As the court of appeals noted, however, petitioner presented to the jury all the factors that cast doubt

3. Finally, petitioner contends that conversations in which he did not participate were either hearsay or irrelevant to the case against him, and that the district court erred in admitting those conversations. Pet. 24-29.

The court of appeals properly affirmed the district court's admission of the evidence in question. See Pet. App. 15a-18a. Although petitioner was convicted only on the count involving his statements regarding the September 9 meeting, the indictment also charged that petitioner knowingly made false statements concerning (1) Mauldin's ten percent interest, (2) the meeting at LSU, (3) the plan to convert pesos into dollars, and (4) Tomblin's efforts to secure favorable treatment from the FHLBB. See Pet. App. 6a & n.2. The substance of the challenged conversations (in which petitioner did not participate) involved (1) the meeting in which Tomblin told Gonzalez that he could use political connections to influence the FHLBB, (2) discussions about gaining political influence over Mexican officials, (3) a meeting attended by Mauldin, Tomblin, and Gonzalez, in which Mauldin agreed to help Gonzalez with the FHLBB in exchange for a political contribution to Senator Hecht, and (4) a meeeting in which petitioner's associates discussed Mauldin's ten percent share of their joint enterprise. Pet. App. 16a-17a.

Because petitioner was indicted for making false statements, and not for the underlying offenses to which those false statements pertained, it is clear that the challenged conversations were not admitted for the

---

on his knowledge that his statements were false. Pet. App. 9a. Because there was sufficient evidence for a rational jury to infer that petitioner knowingly gave false answers, there is no basis for disturbing the verdict in this case.

truth of the matters asserted and were therefore not hearsay. See Fed. R. Evid. 801(c). In addition, the district court repeatedly gave limiting instructions that the conversations were not being admitted for the truth of the matters asserted. Pet. App. 17a-18a.

The challenged conversations were clearly relevant to the case against petitioner. See Fed. R. Evid. 401. Even though certain conversations took place outside petitioner's presence, the contents of those conversations tended to confirm what was told to petitioner. Pet. App. 17a. Moreover, by showing that petitioner's associates acted with the intent to bribe government officials, the conversations tended to show a motive for petitioner to conceal information about their joint criminal venture from the grand jury. Hence, the conversations were relevant to showing petitioner's state of mind when he gave his answers to the grand jury.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

JUNE 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45458